

**Letter of Findings: 07-0134
Sales and Use Tax
For the Years 2003, 2004, 2005**

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ISSUES

I. Sales Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-4-1; IC § 6-2.5-6-7; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax on internet and phone sales.

II. Use Tax – Imposition.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-5-1; *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of use tax on some items where Taxpayer claims sales tax had already been paid.

III. Tax Administration – Ten Percent Penalty.

Authority: IC § 6-8.1-5-4; IC § 6-8.1-10.2.1; [45 IAC 15-11-2](#).

Taxpayer protests the proposed assessment of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana partnership that is a retail seller of collegiate wear. The Indiana Department of Revenue (Department) conducted a sales and use tax audit of Taxpayer for the years 2003, 2004, and 2005. The Department assessed additional sales and use tax as a result of the audit. Taxpayer protested the assessment. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Imposition.

DISCUSSION

The Department assessed additional sales tax after a review of Taxpayer's sales journals indicated that Taxpayer charged sales tax to customers, but did not remit correct amounts to the Department. The Department did so after "a reasonable verification of taxpayer's sales was conducted in accordance with current department policies and procedures."

Taxpayer protested that it was assessed sales tax on items that it sold to out-of-state customers via Taxpayer's website and through telephone orders.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a). The person who acquires property in a retail transaction is liable for the tax on the transaction and, unless exempt, shall pay the tax to the retail merchant. The retail merchant shall collect the tax as agent for the state. IC § 6-2.5-2-1(b). If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. IC § 6-8.1-5-1(a). Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC § 6-8.1-5-4 (a). A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times. IC § 6-8.1-5-4 (c). The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC § 6-8.1-5-1(b), (c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

As a preliminary matter, Taxpayer stated that at the end of every month it enters sales information from its daily register tapes for that month into an Excel spreadsheet designed by its accountant that totals its sales and sales tax to be remitted to the Department. The register tapes show gross sales, sales tax, returns, credit card sales, discounts, etc. Taxpayer stated that it routinely was unable to reconcile the Excel spreadsheet with the information derived from its register tapes. Taxpayer reported that it has not been able to figure out the source of this discrepancy, including in consultation with the Department's auditor. While Taxpayer's frustration with its inability to reconcile its records is understandable, nonetheless, it is Taxpayer's obligation to keep its books and records in such a fashion that the Department can determine the amount, if any, of Taxpayer's liability from reviewing those records. IC § 6-8.1-5-4(a).

As for the sales to out-of-state customers, IC § 6-2.5-3-7 states that a person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that

presumption. A retail merchant is not required to produce evidence of non-taxability if the retail merchant receives a valid Indiana exemption certificate from the person who acquired the property. See *id.* IC § 6-2.5-6-7 requires a retail merchant to pay to the Department the sales tax due on taxable transactions regardless of whether the merchant actually collected the sales tax due. Therefore, Taxpayer is required to collect sales tax on all sales that are delivered in Indiana. Pursuant to IC § 6-2.5-4-1(e), the taxable gross retail income received from selling at retail is the price of the property transferred without the rendition of any service; and the transfer is considered to have occurred after delivery of the property to the purchaser.

Taxpayer has provided documentation for December 2004 and December 2005 that show the individuals and locations to whom transactions were billed and to whom items were shipped. Taxpayer is correct that no sales tax is due on those items that were shipped to addresses outside Indiana.

However, it is unclear from the Department's audit report whether or not these out-of-state sales were originally excluded from the audit-generated assessment of additional sales tax. The Department's audit report states that the Department "got these amounts from taxpayer's sales amounts from provided journals (see page 4)." Page 4 of the audit report, however presents totals for reported taxable sales and totals for taxable sales per the audit.

FINDING

Taxpayer's protest is sustained in part on the basis that it does not owe sales tax on those December 2004 and December 2005 sales that were shipped to out-of-state customers, but only to the extent that these transactions were not excluded from the calculations that resulted in the Department's audit-generated assessment. Verification is through supplemental audit.

II. Use Tax – Imposition.

DISCUSSION

The Department assessed use tax on five items Taxpayer purchased during the tax years in question and for which Taxpayer did not provide invoices during the audit.

All tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(b), (c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a use tax on tangible personal property acquired in a retail transaction and which is stored, used, or consumed in Indiana, regardless of the location of that transaction or of the retail merchant making that transaction. IC § 6-2.5-3-2. However, the storage, use, and consumption of tangible personal property in Indiana is exempt from use tax if the property was acquired in a retail transaction in Indiana and the state sales tax has been paid on the acquisition of the property. IC § 6-2.5-3-4(a)(1).

At hearing, Taxpayer provided invoices for four items for which the Department had assessed additional use tax. Two invoices (designated with invoice numbers PSI-22133 and 38033) clearly show that Taxpayer paid sales tax on the materials purchased. These two transactions should be removed from the Department's assessment of additional use tax. An invoice Taxpayer provided for the purchase of shelving and storage items did not show sales tax paid therefore the Department's assessment of additional use tax on those items is correct. The last invoice Taxpayer provided did not match any of the remaining items on which the Department had assessed additional use tax. Therefore, apart from the invoices numbered PSI-22133 and 38033, Taxpayer did not meet its burden of proof to show that the Department's assessment of additional use tax on the remaining items is incorrect.

FINDING

Taxpayer is sustained on its protest of the assessment of use tax on the two items that relate to the invoices designated PSI-22133 and 38033. Taxpayer is denied on its protest of the remaining use tax assessment.

III. Tax Administration – Ten Percent Penalty.

DISCUSSION

The taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows: Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Additionally [45 IAC 15-11-2](#)(c) states:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be

considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and, thus, will be dealt with according to the particular facts and circumstances of each case. Taxpayer's books and records were not maintained in such a fashion that the Department could reasonably determine Taxpayer's tax liability, if any, by reviewing the available records.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

I. Sales Tax – Imposition.

Taxpayer does not owe sales tax on those December 2004 and December 2005 sales that were shipped to out-of-state customers, but only to the extent that these transactions were not excluded from the calculations that resulted in the Department's audit-generated assessment of sales tax. Verification is through supplemental audit. IC § 6-8.1-5-4.

The supplemental audit will use documentation Taxpayer provided at the hearing which is included in Taxpayer's protest file.

II. Use Tax – Imposition.

Taxpayer is sustained on its protest of the assessment of use tax on the two items that relate to the invoices designated with PSI-22133 and 38033. Taxpayer is denied on its protest of the remaining use tax assessment.

The supplemental audit will use documentation Taxpayer provided at the hearing which is included in Taxpayer's protest file.

III. Tax Administration – Ten Percent Penalty.

The ten percent penalty is not waived.

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